

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GAYLA B. SMITH

Claimant

VS.

RAYTHEON AIRCRAFT COMPANY

Self-Insured Respondent

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Docket No. 1,024,198

ORDER

Respondent appealed the April 3, 2007, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Workers Compensation Board heard oral argument on June 15, 2007, in Wichita, Kansas.

APPEARANCES

Chris A. Clements of Wichita, Kansas, appeared for claimant. Timothy A. Emerson of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges she sustained repetitive trauma to her right upper extremity and neck from April through July 8, 2005, while working for respondent. In the April 3, 2007, Award, Judge Barnes determined claimant sustained a 19 percent whole person functional impairment and, accordingly, awarded claimant permanent disability benefits as an unscheduled injury under K.S.A. 44-510e.

Respondent contends the Judge erred in determining the nature and extent of claimant's injuries and asserts claimant has no functional impairment as determined by Dr. James L. Gluck. In the alternative, respondent argues claimant's functional impairment is 2.5 percent to the right shoulder as determined by Dr. Paul S. Stein. Finally, should the Board be persuaded by the opinions of Drs. C. Reiff Brown and P. Brent Koprivica, respondent argues the ratings of all the physicians should be averaged for an appropriate

percentage of functional impairment. Consequently, respondent requests the Board to reduce the Award to one for a scheduled injury under K.S.A. 44-510d.

Conversely, claimant contends the Award should be affirmed. Claimant argues the difference in the doctors' functional impairment ratings is largely attributable to whether claimant has sustained impairment to her neck. And despite a July 2005 nerve conduction test that was positive for cervical radiculopathy, neither Dr. Gluck nor Dr. Stein found any impairment in claimant's neck. In short, claimant contends Dr. Gluck and Dr. Stein's ratings are not reliable and, therefore, should not be utilized.

The only issue before the Board on this appeal is the nature and extent of claimant's injuries and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The parties stipulated claimant sustained personal injury by accident arising out of and in the course of her employment with respondent from April through July 8, 2005. The history claimant provided to various doctors is that her right upper extremity symptoms, which first began in 2003 when she was doing a lot of crimping of wires at work, had increased over a several-month period before June 2005.

Claimant was laid off in July 2005 but she returned to work for respondent in July 2006. Consequently, claimant requests permanent disability benefits based only upon her functional impairment. The parties presented the opinions from four physicians regarding claimant's permanent functional impairment.

Dr. James L. Gluck, an orthopedic surgeon, treated claimant from June through early September 2005. At claimant's first visit with Dr. Gluck on June 23, 2005, claimant reported pain in her right upper extremity, shoulder and neck. At that visit the doctor found positive impingement signs in the right shoulder, which indicated claimant's symptoms were possibly coming from the subacromial space, and a positive Tinel's on the right, which indicated there was some possible nerve compression.

Dr. Gluck next saw claimant in July 2005 and thought that most of her arm pain was coming from her right shoulder. The impingement in the shoulder, however, did not account for the numbness that claimant was experiencing down into her right arm and hand. Therefore, the doctor ordered an electrodiagnostic test to look for brachial plexus or cervical pathology. That test, which was performed on July 19, 2005, showed changes consistent with C8-T1 cervical radiculopathy to the right upper extremity. Nevertheless, the

test did not show any abnormality to the median or ulnar nerves in claimant's right upper extremity.

Because of the positive results from the nerve conduction studies, Dr. Gluck ordered an MRI. The MRI failed to show a structural abnormality in claimant's cervical spine that could be related to a nerve abnormality in her right upper extremity. According to the doctor, claimant's nerve abnormality could have been caused by some swelling in and around the nerve or, perhaps, the electrodiagnostic test rendered a false positive result. A third possibility was that there was an abnormality and the MRI failed to show it.

At a September 2005 appointment, Dr. Gluck released claimant from medical treatment. The doctor did not place any specific restrictions on claimant, but he did recommend that she adjust her activities according to her tolerance level and that she should try to avoid both repetitive pushing and pulling and working overhead with the right arm.

Without seeing or examining claimant after September 8, 2005, at which time he conducted a rather limited examination, Dr. Gluck issued his opinion on claimant's permanent impairment in early December 2005.¹ Utilizing the fourth edition of the *AMA Guides*², the doctor found claimant had no impairment to her right upper extremity as she had no loss of motion in her shoulder or elsewhere in the right upper extremity. And although claimant had numbness, the doctor did not correlate it with any specific dermatomal distribution. Moreover, the earlier electrodiagnostic test had ruled out both carpal tunnel syndrome and cubital tunnel syndrome. When rating claimant in December 2005, Dr. Gluck noted claimant's pain should resolve by avoiding certain activities.

Claimant later returned to Dr. Gluck in December 2005 with complaints of right upper extremity numbness and increased pain, which was primarily in the lateral right arm and extended up into her shoulder and neck. The doctor's notes from that December 2005 appointment indicate they discussed surgery, but claimant opted for a repeat shoulder injection. The doctor's final impression was (1) "[r]ight shoulder and arm pain - impingement syndrome previously improved with injection" and (2) "[r]ight upper extremity numbness"³ That was the last appointment claimant had with Dr. Gluck. But that last appointment did not change the doctor's opinion regarding claimant's permanent impairment as she did not return for a follow-up visit.

¹ Gluck Depo. at 19.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

³ Gluck Depo., Ex. 2.

Dr. Gluck's records do not indicate whether he tested the range of motion in claimant's neck at either the September or December appointment. But his notes do reflect he found full flexion, extension, and rotation in her neck in June 2005, when he first examined her.

Two months before her December 2005 appointment with Dr. Gluck, at her attorney's request claimant was evaluated by Dr. C. Reiff Brown, another orthopedic surgeon. Dr. Brown examined claimant on October 17, 2005. Despite not working for approximately three months, claimant had constant pain in the lateral and mid upper right arm area and intermittent pain in the upper and anterior aspect of her right shoulder. The pain intermittently radiated into the medial aspect of claimant's right forearm and into certain fingers of her right hand.

While examining claimant's neck, Dr. Brown found reduced range of motion with extension and lateral flexion, which usually indicates there is something interfering with disc function or facet function. Dr. Brown attributed the loss of motion to claimant's discomfort and the tightening of soft tissue. The doctor determined claimant had a C8-T1 radiculopathy, mild acromial impingement syndrome in the right shoulder, and a developing myofascial pain syndrome. Using the fourth edition of the *AMA Guides*, Dr. Brown rated claimant as having a 15 percent whole person impairment for the cervical radiculopathy and a 5 percent whole person impairment for myofascial pain syndrome, which combined for a 19 percent whole person impairment. The doctor did not believe the right shoulder acromial impingement syndrome warranted a rating as the lost range of motion from that condition was insufficient.

Dr. Brown recommended claimant permanently avoid (1) work involving frequent extension and rotation of the cervical spine greater than 30 degrees, (2) work activity involving frequent use of the right hand above shoulder level, (3) all lifting above shoulder level, and (4) frequent pushing and pulling with the right upper extremity. In addition, the doctor concluded claimant's lifting should be restricted to 30 pounds occasionally and 20 pounds frequently.

At Judge Barnes' request, neurological surgeon Dr. Paul S. Stein examined claimant for purposes of rendering an opinion in this claim. Dr. Stein examined claimant on February 16, 2006, and concluded claimant sustained a 2.5 percent impairment to her right upper extremity due to crepitus in her right acromioclavicular joint as measured by the fourth edition of the *AMA Guides*. Because claimant had a cumulative trauma syndrome, the doctor recommended that she avoid activities that would aggravate or worsen her condition, such as enforced and continuous repetitive activity with the upper extremities. In addition, Dr. Stein concluded claimant should avoid repetitive use of impacting tools, vibrating power tools, and crimping tools.

Dr. Stein did not rate claimant's neck as the doctor felt she did not really complain of neck pain and his examination did not reveal any specific findings in the cervical spine. Moreover, the doctor found claimant's range of motion in her cervical spine was relatively good, found she had no focal tenderness, and found she had no muscular spasm. Dr. Stein failed to find any signs of neurological deficit attributable to the cervical spine. Dr. Stein does not disagree that claimant may have intermittent discomfort in her cervical spine, but the doctor does not believe that would comprise an impairment under the *Guides*. Moreover, Dr. Stein did not believe the results from the electrodiagnostic test requested by Dr. Gluck established claimant had actual radiculopathy. In short, Dr. Stein believes claimant may have a non-specific neurogenic thoracic outlet syndrome, which is something that can hardly be diagnosed or treated.

At her attorney's request, claimant was evaluated by Dr. P. Brent Koprivica, who now limits his medical practice to independent medical exams. Dr. Koprivica examined claimant in late May 2006 and determined claimant had chronic cervicothoracic pain and a cervical radiculopathy, which the doctor believes was proven electrodiagnostically, and chronic impingement syndrome of the right shoulder girdle. The doctor related those conditions to the wire harness work claimant performed for respondent. Using the fourth edition of the *AMA Guides*, Dr. Koprivica found claimant had a 15 percent whole person impairment for her cervical injury and an eight percent impairment to the right upper extremity for motion deficits arising from the impingement syndrome. Combining the impairments, the doctor found claimant had a 20 percent whole person impairment.

At the time of the October 2006 regular hearing, claimant was continuing to experience stiffness in her neck and occasional numbness into her right arm down into her fingertips. Claimant noticed her symptoms increased when she was active and when she hung her hand down for a prolonged period of time. At the time of her regular hearing, claimant had been receiving chiropractic treatment at her own expense for approximately two months.

Being persuaded by the opinions of Dr. Brown and Dr. Koprivica, the Judge found claimant sustained a 19 percent whole person functional impairment due to her work injuries. The Board is most persuaded by Dr. Brown's opinions regarding claimant's injuries and the resulting 19 percent functional impairment. The greater weight of the evidence indicates the situs of claimant's injuries included both claimant's neck and right upper extremity, although the doctors had varied opinions of the nature of the problems and the amount of impairment created. Dr. Brown's opinions are credible and are consistent with claimant's ongoing symptoms. The Board adopts Dr. Brown's opinions. Accordingly, the April 3, 2007, Award should be affirmed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁴ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the April 3, 2007, Award entered by Judge Barnes.

The record does not contain a written fee agreement between claimant and her attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee in this matter, counsel must submit the written agreement to the Judge for approval.

IT IS SO ORDERED.

Dated this ____ day of July, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Timothy A. Emerson, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge

⁴ K.S.A. 2006 Supp. 44-555c(k).